16-2946,16-2949

THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALLCO FINANCE LIMITED,
Plaintiff-Appellant
vs.
ROBERT KLEE, in his Official Capacity as Commissioner of the Connecticut Department of Energy and Environmental Protection,
Defendant-Appellee
and
KATIE SCHARF DYKES, JOHN W. BETKOSKI, III, and MICHAEL CARON, in their
Official Capacity as Commissioners of the Connecticut Public Utilities Regulatory Authority,
Defendants-Appellees,

Appeal from the United States District Court for the District of Connecticut
Nos. 3:15-cv-00608, 3:16-cv-00508
Hon. Charles S. Haight, Jr.

AMICUS CURIAE BRIEF OF THE CONNECTICUT LIGHT AND POWER COMPANY DBA EVERSOURCE ENERGY

In support of Defendant-Department of Energy and Environmental Protection and Defendant-Connecticut Public Utilities Regulatory Authority

In support of affirmance of the United States District Court for the District of Connecticut

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CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1, The Connecticut Light and Power Company dba Eversource Energy hereby discloses that it is a Connecticut corporation that is a wholly-owned subsidiary of Eversource Energy, which is a publicly traded corporation.

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I. INTEREST OF AMICUS CURIAE

Pursuant to Fed. R. App. P. 29(a), all of the parties to this appeal consented to *amicus curiae*, The Connecticut Light and Power Company dba Eversource Energy ("Eversource"), filing this Amicus Curiae Brief. Eversource is an electric distribution company ("EDC") that provides electric distribution service to approximately 1.1 million customers in 149 towns in Connecticut.[1] Eversource is regulated at the state-level by Defendant-PURA[2] and at the federal level by FERC. The outcome of this appeal is critical to Eversource's customers because the power purchase agreements Plaintiff-Allco seeks for its renewable energy qualified facility ("QF") projects would be paid for by, *inter alia*, Eversource's customers.

II. SUMMARY

This Brief asks the United States Court of Appeals for the Second Circuit ("Court") to affirm the District Court's dismissal of Plaintiff-Allco's claims. This Brief demonstrates, in Section III.A below, that this Court's November 2, 2016 emergency injunction of the Connecticut portion of the 2015 RFP should be terminated immediately because Allco cannot, as a matter of law, satisfy the

[1] Pursuant to Fed. R. App. P. 29(c)(5), Eversource's counsel authored this Brief in whole; Eversource funded the entire cost of preparing and submitting this Brief.
[2] Capitalized terms used but not defined herein have the meaning assigned to them in Plaintiff-Allco's September 28, 2016 Brief in this appeal ("Allco Brief").

standard for obtaining and maintaining an injunction. The District Court appropriately denied Allco's request for an injunction.

Section III.B below demonstrates that – even assuming this Court concludes that Allco has standing to maintain this appeal – the District Court's dismissal of Allco's claims should be affirmed on the alternative ground that FERC already sanctioned DEEP and PURA to procure renewable energy from both QF and non-QF projects through state-sponsored RFPs like the 2015 RFP.

III. ARGUMENT

A. The Emergency Injunction Of The 2015 RFP Should Be Terminated Immediately Because Allco Cannot Satisfy The Standard For Maintaining An Injunction

On November 2, 2016, this Court granted Allco's emergency motion to enjoin DEEP and PURA "from awarding, entering into, executing, or approving any wholesale electricity contracts in connection with the current energy solicitation (the 2015 RFP) during the pendency of this appeal". As explained in greater detail below, the injunction should be terminated immediately because Allco cannot satisfy the standard for obtaining and maintaining that injunction.

The district court appropriately denied Allco's request for an injunction. Allco Fin. Ltd. v. Klee, No. 3:15-CV-608 (CSH), 2016 WL 4414774 at *25 (D. Conn. Aug. 18, 2016). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer

irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20, 129 S.Ct. 365 (2008).

Eversource anticipates that DEEP and PURA will demonstrate in their November 22, 2016 Brief that Allco failed to satisfy these four criteria, and therefore, the injunction should be terminated immediately. In this Brief, Eversource focuses on demonstrating why Allco cannot satisfy the second prong of this test, which requires Allco to demonstrate that it "is likely to suffer irreparable harm in the absence of preliminary relief". Id. at 20. This Court stated:

> [A] showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, . . . Irreparable harm must be shown by the moving party to be imminent . . . and the alleged injury must be one incapable of being fully remedied by monetary damages.

Reuters Ltd. v. United Press Int'l, Inc., 903 F.2d 904, 907 (2d Cir. 1990)(citations omitted; internal quotation marks omitted).

Allco's claim to enjoin the 2015 RFP is based upon its unsubstantiated allegation that awarding contracts to non-QF projects in the 2015 RFP will irreparably harm it by depriving Allco of an opportunity to have an EDC like Eversource enter into one or more power purchase agreements with Allco's QF projects. (See Allco Brief at 35, 58.) Allco attempts (albeit unsuccessfully) to support this unsubstantiated claim by alleging that, "[w]hen power is purchased

from [a] large non-QF generator [through the 2015 RFP], it relieves the utility [like Eversource] of the need to purchase that power from some alternative source by increasing supply" (id. at 58), and "[t]he non-QF contracts [awarded in the 2015 RFP] represent an enormous amount of renewable energy that would virtually eliminate the demand for QF renewable energy in Connecticut for years" (id. at 35).

Allco's allegations are incorrect as a matter of law because federal and state law obligates Eversource to purchase output from QFs like Allco; and nothing that occurs in the 2015 RFP will alter that legal obligation. The 2015 RFP is a solicitation for the purchase of a variety of renewable energy and associated electric transmission resources, and it has no connection with the obligation of a utility to purchase electricity from a QF under PURPA. Congress directed FERC, in consultation with state utility commissions, to require utilities to purchase electric generation from QFs. See 16 U.S.C. § 824a–3(a); Indep. Energy Producers Ass'n, Inc. v. CPUC, 36 F.3d 848, 856 (9th Cir. 1994) (citation omitted).[3]

PURA explained that the above-described requirement "is known as the must-buy requirement." Petition of Windham Solar LLC for Approval of A Power Purchase Agreement Between Windham Solar LLC & the Connecticut Light & Power Co. d/b/a Eversource Energy, Docket No. 16-03-08, 2016 WL 4505797, at

[3] Section 210(a) of PURPA states FERC's "rules require electric utilities to offer to . . . purchase electric energy from such [QF] facilities". 16 U.S.C. § 824a–3(a)(2).

*7 (Aug. 24, 2016). PURA also explained that although "a utility can file an application at FERC to extinguish the must-buy provision of a QF," "Eversource has not filed such an application at FERC." Id.

In addition, PURA confirmed that a QF like Allco "is entitled to sell its non-firm power to Eversource under Rate 980 at the avoided cost set forth in that tariff, which is the Market Price yielded by the real-time energy market operated by ISO-NE." Id. at *12. "Rate 980" is the PURA-approved tariff under which Eversource is obligated to purchase output from QFs like Allco. Id. PURA also found that Eversource was ready, willing, and able to purchase output from Allco's Connecticut QF affiliate, Windham Solar, at Rate 980 stating: "Eversource does not seek to avoid purchasing Windham Solar's [QF] output. Rate 980 exists as a standing offer to purchase Windham Solar's [QF] output, and can act as a long-term contract with a formula rate that resets to the current ISO-NE Market Price." Id. at *16 fn. 10. PURA also confirmed that neither Allco nor any other QF must participate in an RFP as a condition precedent to having Eversource purchase the QF's output under Rate 980, stating: "[T]here is no bidding process associated with Rate 980, and no bidding process exists as a precondition to Rate 980." Id. at *22.

Allco cannot suffer irreparable harm if the 2015 RFP continues during the pendency of this appeal because (1) PURA stated Allco is entitled to have the output of its QF projects purchased by Eversource at Rate 980; (2) PURA stated

Allco does not need to participate in an RFP to obtain Rate 980 treatment; and (3) the 2015 RFP has no relationship to purchases by Eversource from a QF under PURPA.

Finally, Allco cannot suffer irreparable harm if the 2015 RFP continues because Allco's alleged injury is capable of being fully remedied by monetary damages. In order to obtain and maintain an injunction "the alleged injury must be one incapable of being fully remedied by monetary damages." Reuters Ltd., 903 F.2d at 907. Because Eversource is obligated to purchase output from Allco's QF projects under the terms of the Rate 980 tariff, the only alleged injury Allco can claim to have suffered involves the adequacy of the amount paid under Rate 980. That issue was decided by PURA; see Petition of Windham Solar LLC, 2016 WL 4505797; and Allco's appeal of that issue is pending before the Connecticut Superior Court Tax & Administrative Appeals Session in Windham Solar LLC v. PURA, Doc. HHB-CV-16-6035301 (Conn. Super. Ct., appeal filed Oct. 28, 2016.)

For all of these reasons, the emergency injunction should be terminated immediately so that the 2015 RFP can continue.

B. FERC Has Sanctioned The New England States' Procurement Of Non-QF Projects Through State-Sponsored RFPs, Including The 2015 RFP

Allco alleges that the 2015 RFP's procurement of power from non-QFs is preempted by the Federal Power Act ("FPA")[4] because Allco claims that the only instance in which a State can procure wholesale power contracts from renewable resources is pursuant to PURPA's[5] exemption to the FPA for QFs. (See Allco Brief at 54.) Allco alleges that, "Outside of PURPA, States have no authority to regulate in any way a wholesale [electricity] transaction." (Id.)

Allco's claim is incorrect as a matter of law because – in addition to the reasons that will be provided in the Defendants' November 22, 2016 Brief – FERC sanctioned the New England States' procurement of wholesale power contracts from both QF and non-QFs. This constitutes an additional basis for affirming the District Court's decision and justifying the Defendants' resource procurement under the 2015 RFP.

FERC's authority under Section 205 of the FPA authorizes it to accept rates, contracts, and tariff provisions affecting services subject to its jurisdiction if it finds these provisions are just and reasonable and not unduly discriminatory. 16 U.S.C. § 824d. As described below, FERC approved tariff provisions for New

[4] 16 U.S.C. § 791a, et seq.
[5] 16 U.S.C.A. § 824a-3.

England that clearly contemplate the very solicitation of QF and non-QF resources that Allco attacks as preempted.

Specifically, FERC has approved wholesale electric market rules for New England proposed by the independent system operator, ISO New England Inc. ("ISO-NE"). This series of market rule tariff changes affects the procurement of new electric generating resources in New England. One of these changes, called the minimum offer price rule ("MOPR"), prevents the exercise of buyer-side market power in the wholesale market by requiring new electric generating resources to supply capacity above a price floor. See ISO New England Inc., 155 FERC ¶ 61,023 (2016). ISO-NE proposed an exemption from the MOPR for renewable resources in New England, in part, because it determined that doing so promotes State policies that encourage the development of renewable resources. Id. at ¶¶ 24, 35, 39. A renewable resource that qualifies for this exemption is known as a "Renewable Technology Resource". Id. at fn. 91, fn. 151.

On April 8, 2016, FERC affirmed its approval of ISO-NE's above-described change to the wholesale market rules in New England. See ISO New England Inc., 155 FERC ¶ 61,023 (2016).[6] FERC's decision is significant for the following reasons. First, FERC recognized that ISO-NE proposed this market rule change

[6] The history that led to FERC's April 8, 2016 decision affirming this market rule is in ISO New England Inc., 147 FERC ¶ 61,173 (2014), reh'g denied, 150 FERC ¶ 61,065 (2015); NextEra Energy Resources, LLC v. FERC, No. 15-1070 (D.C. Cir. 2015).

because, among other things, "[t]he renewables exemption . . . is a reasonable means of accommodating legitimate state policies that favor renewable resources . . .", id. at ¶ 24, and "[h]ere, the record reflects that ISO-NE's stakeholders sought to accommodate the [renewable] public policy objectives of the six New England states," id. at ¶ 35. FERC also confirmed that it had its own goal to accommodate state policies that favor renewable resources, stating in relevant part:

> The [Federal Energy Regulatory] Commission has sought to ensure that capacity prices [in the New England market] are at a just and reasonable level, sufficient to incent economically-efficient existing resources to stay in the capacity market and new resources to enter, so as to enable ISO-NE to meet its reliability requirements. ***In pursuing that goal, the Commission has also sought to accommodate the ability of states to pursue their [renewable] policy goals.***

Id. at ¶ 23 (emphasis added).

Second, pursuant to its authority to approve tariffs affecting wholesale sales of electricity in interstate commerce under Section 205 of the FPA, FERC's April 8, 2016 decision affirmed ISO-NE's Renewable Technology Resource market rule. Id. at 2. This market rule recognizes that states procure Renewable Technology Resources through state-initiated procurements; it does not differentiate between QF and non-QF projects, and it does not exclude non-QFs. Instead, the broad text of the FERC-approved market rule states that *any* renewable resource can become a Renewable Technology Resource if, among other things, it:

> qualif[ied] as a renewable or alternative energy generating resource under any New England state's mandated (either by statute or

> regulation) renewable or alternative energy portfolio standards as in effect on January 1, 2014, or, in states without a standard, qualify under that state's renewable energy goals as a renewable resource (either by statute or regulation) as in effect on January 1, 2014. The resource must qualify as a renewable or alternative energy generating resource in the state in which it is geographically located.

ISO-NE Market Rule Section III.13.1.1.1.7(b), quoted in ISO New England Inc., 147 FERC ¶ 61,173, at ¶ 88 (2014), reh'g denied, 150 FERC ¶ 61,065 (2015). This market rule also states that in order to become a Renewable Technology Resource, a renewable resource must demonstrate that a State has awarded it a wholesale power contract or other comparable cost recovery mechanism for its output. See ISO New England Inc., 150 FERC ¶ 61,065, at ¶ 9 (2015).

As demonstrated, FERC's April 8, 2016 decision is significant because it acknowledged that DEEP's (and the other New England States') procurement of QF and non-QF resources through RFPs constituted a legitimate exercise of state power to encourage the development of renewable resources that participate in wholesale electricity markets. Moreover, FERC's decision recognized that allowing both QF and non-QF projects that are awarded contracts through state-sponsored procurements to participate or "clear" in the New England wholesale markets yields an economically efficient outcome for consumers. See ISO New England Inc., 155 FERC ¶ 61,023 at fn. 59 (2016).

For these reasons, FERC's decision and the market rule it approved constitute an additional basis for justifying DEEP's proposal to procure QF and

non-QF resources in the 2015 RFP.

IV. CONCLUSION

For all of the above-described reasons, Eversource respectfully requests that the Court: (1) terminate the emergency injunction immediately to allow the 2015 RFP to proceed; and (2) affirm the District Court's dismissal of Allco's claims.

THE CONNECTICUT LIGHT AND POWER COMPANY DBA EVERSOURCE ENERGY

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29 & 32 and Local Rule 32.1, I hereby certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B) because this brief contains [2,927] words, as counted by Microsoft Word, excluding the items that may be excluded under Federal Rule 32(a)(7)(B)(iii); and it complies with the requirements governing Briefs of an Amicus Curiae in Fed. R. App. P. 29.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) because this brief has been prepared in 14-point, proportionally spaced Times New Roman font that includes serifs using Microsoft Word.

By: */s/* Ann H. Rubin
Ann H. Rubin

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November, 2016, I caused to be served, using the Court's CM/ECF system, a copy of the foregoing Amicus Curiae Brief to all counsel of record.

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